

1
2
3
4
5
6

7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9
10 MARK THOMPSON,
11 Plaintiff,
12 vs.
13 JO ANNE B. BARNHART, Commissioner
14 of the Social Security Administration,
15 Defendants.

Case No. 2:05-CV-01543-RLH (GWF)

FINDINGS AND RECOMMENDATIONS

16 This matter is before the Court on Plaintiff's Notice of Motion and Motion for Reversal
17 and/or Remand (#13), filed May 12, 2006; Defendant's Motion to Affirm and in Opposition to
18 Plaintiff's Motion for Reversal and /or Remand (#17), filed August 14, 2006; and Plaintiff's Reply
19 Memorandum in Support of His Motion for Reversal and/or Remand and in Opposition to
20 Defendant's Motion to Affirm (#19), filed September 1, 2006.

21 **BACKGROUND**

22 On October 8, 1997, Plaintiff filed applications for disability insurance benefits and
23 supplemental security income benefits. (Tr. 128-130, 384-386). These applications were denied
24 both on initial review and on reconsideration. (Tr. 110-113, 117-121). A hearing was held before an
25 Administrative Law Judge (ALJ) on January 13, 1999 and March 25, 1999. (Tr. 15-22). The ALJ
26 decision denied Plaintiff's application on May 28, 1999. The Appeals Council denied review of the
27 ALJ decision on August 21, 2001. (Tr. 3-5). Plaintiff then brought an action in this court which was
28 remanded pursuant to the fourth sentence of 42 U.S.C. § 405(g). (Tr. 554-556, 557-558). A new

1 ALJ hearing was held on January 5, 2004. (Tr. 714-745). The ALJ issued a decision that was
 2 partially favorable to Plaintiff, finding him to have been disabled within the meaning of the Act
 3 between September 1, 1997 and ending March 22, 1999. (Tr. 527-540, 539-540). The Appeals
 4 Council denied Plaintiff's request for review of the 2004 decision and the instant action was
 5 commenced. (Tr. 391-394).

DISCUSSION

7 A federal court's review of an ALJ's decision is limited to determining only (1) whether the
 8 ALJ's findings were supported by substantial evidence and (2) whether the ALJ applied the proper
 9 legal standards. *Delorme v. Sullivan*, 924 F.2d 841, 846 (9th Cir. 1991). The Court must look to the
 10 record as a whole and consider adverse and supporting evidence. *Penny v. Sullivan*, 2 F.3d 953, 956
 11 (9th Cir. 1993). "Substantial evidence is defined as 'more than a scintilla but less than a
 12 preponderance.'" *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999) (*quoting Matney v. Sullivan*,
 13 981 F.2d 1016, 1018 (9th Cir. 1992)). Hence, where the evidence may be open to more than one
 14 rational interpretation, the court is required to uphold the decision. *Moore v. Apfel*, 216 F.3d 864,
 15 871 (9th Cir. 2000) (*quoting Gallant v. Heckler*, 753 F.2d 1450, 1453 (9th Cir. 1984)).

16 "Claims of disability are evaluated under a five-step sequential evaluation procedure. *See* 20
 17 C.F.R. § 404.1520(a)-(f)." *Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2001). The claimant
 18 carries the burden with respect to steps one through four. *Tackett*, 180 F.3d at 1098. If a claimant is
 19 found to be disabled, or not disabled, at any point during the process, then no further assessment is
 20 necessary. 20 C.F.R. § 404.1520(a). Under the first step, the Secretary determines whether a
 21 claimant is currently engaged in substantial gainful activity. *Id.* § 416.920(b). If so, the claimant is
 22 not considered disabled. *Id.* § 404.1520(b). Second, the Secretary determines whether the
 23 claimant's impairment is severe. *Id.* § 416.920(c). Again, if the impairment is not severe, the
 24 claimant is not considered disabled. *Id.* § 404.152(c). Third, the claimant's impairment is
 25 compared to the "List of Impairments" found at 20 C.F.R. § 404, Subpt. P, App. 1. The claimant
 26 will be found disabled if the claimant's impairment meets or equals a listed impairment. *Id.* §
 27 404.1520(d). If a listed impairment is not met or equaled, the fourth inquiry is whether the claimant
 28 can perform past relevant work. *Id.* § 416.920(e). If the claimant can engage in past relevant work,

1 then no disability exists. *Id.* § 404.1520(e). If the claimant cannot perform past relevant work, the
2 Secretary has the burden to prove the fifth and final step by demonstrating that the claimant is able
3 to perform other kinds of work. *Id.* § 404.1520(f). If the Secretary cannot meet his or her burden,
4 the claimant is entitled to disability benefits. *Id.* § 404.1520(a).

5 This matter was reviewed on remand by ALJ Buls to determine if the Plaintiff was capable
6 of past relevant work. Specifically, ALJ Buls was instructed to “give further consideration to
7 Plaintiff’s maximum residual functional capacity and provide an appropriate rationale with specific
8 references to the evidence of record.” (Tr. 555). Plaintiff contends that despite this instruction, the
9 ALJ’s decision was incorrect as a matter of law.

10 In determining whether Plaintiff could perform his past work or other kinds of work, ALJ
11 Buls relied on the medical records and the February 9, 1998 report of examining physician Dr.
12 Siciarz regarding Plaintiff’s medical condition between September 1997 and March 21, 1999 in
13 finding that Plaintiff was under a disability as defined in the Social Security Act during that time
14 period. Plaintiff stated during his prior March 25, 1999 hearing that he was seeking a closed period
15 of disability from September 1997 to March 1999 and that he intended on going back to work. (71-
16 72, 99). At the January 5, 2004 hearing, however, Plaintiff’s counsel withdrew that request and
17 stated that because of Plaintiff’s ongoing medical problems, Plaintiff was seeking a determination of
18 continuing disability after March 22, 1999.

19 The ALJ found, however, that Plaintiff began to experience medical improvement in March
20 1999. The ALJ determined that as of March 22, 1999 the Plaintiff retained the ability to lift and
21 carry 50 pounds and was able to stand for two hours and sit for six hours in an 8-hour workday.
22 This determination was drawn from Dr. Siciarz’s evaluation and Plaintiff’s testimony. (Tr. 70-71,
23 270-274, 537). The ALJ’s determination was based on the lessened frequency and intensity of
24 medical treatment after March 1999, the fact that Plaintiff went for long periods of time without
25 medical treatment and Plaintiff’s testimony at the March 1999 and January 5, 2004 hearings
26 regarding his medical condition, his activities of daily living and his functional capacity. The ALJ
27 left the record open for a period of 30 days after the hearing for Plaintiff to submit additional
28 medical records in support of his claim, including records regarding his testimony that he suffers

1 from seizures. Plaintiff, however, did not submit additional records. Taking the medical evidence
2 presented to him, and the opinion of treating physician Dr. Siciarz, the ALJ determined that Plaintiff
3 was capable of light duty exertional jobs that permitted him to sit or stand as needed.

4 At the January 5, 2004 hearing, Vocational Expert McAlpine testified that Plaintiff's past
5 relevant work as a welder and carpenter were too heavy for Plaintiff to perform. Accordingly, the
6 burden shifted to the Government to establish whether Plaintiff was capable of performing other
7 types of work. The ALJ questioned the Vocational Expert as to what specific types of employment
8 Plaintiff could perform given his physical and functional limitations. The Vocational Expert
9 testified that Plaintiff could perform work as a security guard, ticket taker, or parking lot attendant.
10 (Tr. 740-741). She also testified that certain mental skills that Plaintiff developed through his
11 previous occupation, such as organizational skills, were transferable to these types of occupations.
12 The Vocational Expert testified that the number of such available jobs in the national economy and
13 the State of Arizona where Plaintiff now resided, was reduced by the necessity that Plaintiff be able
14 to stand and stretch every 30 minutes. She testified, however, that there were significant numbers
15 of jobs as a security guard, ticket taker, or parking lot attendant that Plaintiff could perform within
16 his particular limitations.

17 The Plaintiff argues that the ALJ's decision was not supported by substantial evidence based
18 on the record as a whole and that the ALJ substituted his lay opinion for that of the medical records
19 which support a finding that Plaintiff continues to be disabled from performing any other work.
20 Plaintiff argues that the decision of the ALJ should be reversed and the Court should direct that
21 Plaintiff be awarded disability benefits based on a finding that he is disabled, or alternatively, that
22 this matter should be remanded to require that a medical evaluation be obtained to assess Plaintiff's
23 condition.

24 The Court finds, however, that the ALJ's decision was supported by substantial evidence,
25 including the February 1998 report of Dr. Siciarz, the lessened frequency and intensity of medical
26 treatment after March 22, 1999, and Plaintiff's testimony at the hearing regarding his physical
27 capacity, activities of daily living, and the testimony of the Vocational Expert regarding the types of
28 available work Plaintiff can perform within his physical and functional limitations.

CONCLUSION

The ALJ's findings were supported by substantial evidence and the proper legal standards were applied. Plaintiff did not present significant medical evidence that he was incapable of light duty work or that his disability continued after March 22, 1999.

IT IS HEREBY RECOMMENDED that Plaintiff's Notice of Motion and Motion for Reversal and/or Remand (#13) be **DENIED** and that benefits be awarded to Plaintiff in conjunction with the ALJ decision dated March 22, 2004.

NOTICE

9 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be
10 in writing and filed with the Clerk of the Court within ten (10) days. The Supreme Court has held
11 that the courts of appeal may determine that an appeal has been waived due to the failure to file
12 objections within the specified time. *Thomas v. Arn*, 474 U.S 140, 142 (1985). This circuit has also
13 held that (1) failure to file objections within the specified time and (2) failure to properly address
14 and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal
15 factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir.
16 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 4th day of January, 2007.

George Foley Jr.

**GEORGE FOLEY, JR.
UNITED STATES MAGISTRATE JUDGE**